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[redacted]

IN THE UTAH COURT OF APPEALS

930460-CA

JANICE ROUNDS and DYLAN ROUNDS,	)	
Plaintiffs/Appellants,	)	No. 930460-CA
vs.	)	PRIORITY NO. 15
THE STATE OF UTAH; and UTAH DEPARTMENT OF TRANSPORTATION	)	
Defendants/Appellees.	)	

BRIEF OF APPELLANTS

APPEAL FROM
THE THIRD JUDICIAL DISTRICT COURT SALT LAKE COUNTY
JUDGE J. DENNIS FREDERICK
CASE NO. 900902566-PI

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MILO S. MARSDEN - #2086
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FILED

JUL 27 1993

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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I. STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over final orders or judgments rendered in the Utah State District Courts pursuant to Utah Code Ann. §78-2a-3(2)(j)(1992).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW

1. Did the district court rule correctly that Utah R. Civ. P. 58A does not require Defendants to give Plaintiffs notice of the signing and entry of the order?

Because the trial court's ruling on this issue is strictly a legal conclusion, this court should accord it no difference, and should apply a "correction of error" standard of review. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

2. Did the district court rule correctly that Rule 4-504(4) of the Utah Code of Judicial Administration does not require Defendants to give Plaintiffs notice of the signing or entry of the order.

Because the trial court's ruling on this issue is strictly a legal conclusion, this court should accord it no difference, and should apply a "correction of error" standard of review. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

3. Did the district court rule correctly that a party's failure to provide notice of entry of order and failure to file proof of service does not toll the effective date of the judgment until actual notice is received by the opposing party?

Because the trial court's ruling on this issue is based upon stipulated facts, those facts are treated as conclusions of law. Zions First National Bank v. National American Title Ins., 749 P.2d 651, 656 (Utah 1988).

III. APPLICABLE STATUTES

1. Utah Rules of Civil Procedure, Rule 58A. See infra Addendum.

2. Utah Code of Judicial Administration, Rule 4-504(4). Id.

IV. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from the district court's Order denying Plaintiff's Motion for Relief from Judgment. CR. 183. Plaintiffs made claim against the State of Utah and the action was dismissed by stipulation, but Defendants failed to notify Plaintiffs of the entry of the order and the question was whether this is sufficient basis for tolling the order's effective date so that Plaintiffs may refile their complaint and a bond within the one year statute of limitations.

B. COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

1. On January 29, 1988, David W. Rounds was killed and Dylan Rounds was injured in an automobile collision on Utah State Route 30 in Cache County, Utah. See, Court Record ("hereinafter CR."), 2.

2. On Monday, January 30, 1989, Plaintiffs, Janice Rounds, the surviving spouse and Dylan Rounds, minor son of said decedent, and Dylan Rounds, in his individual capacity, made claim against the State of Utah and the Utah Department of Transportation for the wrongful death of David W. Rounds and for personal injuries sustained by Dylan Rounds. CR. 2 at ¶4; CR. 138.

3. Thereafter, this action was commenced in the Third Judicial District Court, Salt Lake County, for damages sustained by Plaintiffs as a consequence of said

automobile collision and based on the dangerous and defective condition of said highway and the negligent acts and omissions of agents and employees of the Defendants. CR 2.

4. The Complaint was filed in this matter on April 30, 1990. CR. 2

5. After the parties engaged in discovery, Defendants filed a Motion to Dismiss the case on June 28, 1991. CR. 102.

6. The Court's Order dismissing this action without Prejudice was entered on September 16, 1991. CR. 118.

7. Plaintiffs filed a Motion for Relief from Judgment or Order on January 15, 1993. CR. 120.

8. Defendants filed an Opposition to said Motion on January 27, 1993. CR. 155.

9. Plaintiffs filed a Reply Memorandum on February 16, 1993. CR. 169.

10. The District Court issued a Minute Order denying Plaintiffs' Motion for Relief from Judgment or Order on February 22, 1993, stating the Motion was denied for the reasons set forth in Defendants' Memorandum in Opposition to Plaintiffs' Motion. CR. 179.

11. The Court's Order was entered on March 9, 1993. CR. 183.

12. Plaintiffs filed a timely Notice of Appeal from the Court's final Order on April 5, 1993. CR. 185.

V. STATEMENT OF FACTS

1. On or about the 20th day of August, 1990, Defendants filed their Answer and Jury Demand and thereafter filed an Amended Answer and Jury Demand. CR. 9. On or

about the 25th day of July, 1991, Defendants filed and served their Second Amended Answer and Jury Demand. CR. 14.

2. Between the date this action was filed and the date it was dismissed, as hereinafter described, both parties conducted discovery. See, CR. 41-62.

3. On or about June 28, 1991, Defendant, State of Utah, moved to dismiss this action because Plaintiffs had "failed to file an undertaking in compliance with Utah Code Ann. §63-30-19." CR. 102.

4. Prior to September 3, 1991, Plaintiffs' counsel communicated by telephone with Defendants' counsel and the parties agreed, in principle, to stipulate to a dismissal of the action without prejudice. CR. 140 at ¶ 9.

5. On September 3, 1991, Defendants' counsel caused to be delivered to Plaintiffs' counsel a proposed Stipulation and Order of Dismissal Without Prejudice for approval as to form. CR. 144. The proposed Stipulation was accompanied by a letter of transmittal. CR. 147.

6. Plaintiffs' counsel declined to approve said proposed Stipulation and Order as to form and, on September 4, 1991, mailed to Defendants' counsel a revised Stipulation and Order of Dismissal Without Prejudice for his consideration and approval as to form. CR. 148. A letter of transmittal of Plaintiffs' counsel was attached thereto. CR. 150.

7. In a letter of transmittal to Defendants' counsel as aforesaid, Plaintiffs' counsel stated:

> If you are in agreement with the changes, please present the Order to the Court for signing and entry and provide me with an executed copy thereof.

CR. 150 (emphasis added).[1]

8. Defendants' counsel did not, thereafter, correspond or otherwise communicate with Plaintiffs' counsel regarding the proposed Stipulation and Order. CR. 141 at ¶ 13.

9. Defendants' counsel did not provide a copy of a final Stipulation and Order of Dismissal Without Prejudice to Plaintiffs' counsel prior to submitting it to the Court for signing and entry. Id. at ¶ 14.

10. Defendants' counsel did not provide Plaintiffs' counsel "with an executed copy" of the Stipulation and Order of Dismissal Without Prejudice as requested in the letter of transmittal. Id. at ¶ 15.

11. Plaintiffs' counsel expected to receive a copy of the Court's Order so he could calendar the matter to comply with the one year statute of limitations. CR. 150.

12. Defendants' counsel did not file with the Clerk of the Court and serve on Plaintiffs' counsel or his clients a Notice of Entry of Order of Dismissal Without Prejudice. CR. 141 at ¶ 16.

13. The Stipulation and Order of Dismissal Without Prejudice which was mailed by Plaintiffs' counsel to Defendants' counsel on September 4, 1991, as aforesaid, and which bears the signatures of Defendants' counsel and the Court was signed by the judge. The Order was entered on September 16, 1991. CR. 112.

14. Plaintiffs' counsel did not know that Defendants' counsel had signed the Stipulation or that the Order had been signed or entered until after November 24, 1992,

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[1] See Addendum for a copy of this letter.

following inquiry by Plaintiff, Janice Rounds, as to the status of her case. CR. 142 at ¶ 18.

15. On December 22, 1992, Plaintiffs' counsel explained the foregoing to Defendants' counsel and requested that he stipulate that the Order of Dismissal Without Prejudice be vacated. Id. at ¶ 19.

16. On December 24, 1992, Defendants' counsel advised Plaintiffs' counsel that his clients would not authorize him to so stipulate. Id. at ¶ 20.

VI. SUMMARY OF ARGUMENT

Plaintiffs' legal counsel specifically requested in his letter to Defendants' legal counsel that Defendants' legal counsel provide him with an executed copy of the Order of Dismissal. Mr. Orton, Plaintiffs' legal counsel, did not receive a copy of the entry of the order. Because of this, he did not know the beginning date of the one-year statute of limitations for filing a new complaint. Plaintiffs did not learn of the entry of the order until it was too late to file because of the one-year statute of limitations.[2] Rule 58A of the Utah Rules of Civil Procedure and Rule 4-504(4) of the Utah Code of Administration require Defendants to give Plaintiffs' legal counsel notice of the entry of the Order of Dismissal; therefore, the trial court's failure to grant Plaintiffs' motion requesting relief from the Order of Dismissal under the facts of this matter ›nstitute an abuse of discretion. This court should remand the case to the trial court, orc 'ng t‡ t the effective date of the trial court's Order of Dismissal be November 24, 199. ‡ic ·s

[2] Utah Code Ann. § 78-12-40 (1974).

the day that Plaintiffs and Plaintiffs' legal counsel became aware that the Order of Dismissal had been entered.

The District Court adopted Defendants' arguments in its ruling below.[3] Defendants argued below they were under no obligation to provide notice of entry of order or proof of service pursuant to Rules 4-504(4) and U.R.C.P. 58A because they were not "prevailing parties". Defendants further argued that Plaintiffs' Motion was not a proper Rule 60(b)(7) motion, that no compelling grounds justifying relief existed, and that Plaintiffs' Motion for Relief was not timely filed.

Appellants will show that Defendants were, in fact, prevailing parties and, therefore, had an obligation under both U.R.C.P. 58A and Rule 4-504(4) to provide notice of entry of order. It will also be shown that regardless of their status as a prevailing party, Defendants assumed the obligations set forth in Rule 4-504(4) to provide notice of entry of order and file proof of service. Because Defendants had failed to comply with the rules, relief from judgment was warranted.

The District Court abused its discretion in denying Plaintiffs relief. Plaintiffs' Motion was timely and properly brought under U.R.C.P. 60(b)(7). Further, compelling grounds existed justifying the relief sought in light of Defendants' failure to provide notice of entry of order and the specific request by Plaintiffs' counsel for such notice. Finally, substantial justice and equity demand that Defendants not derive a benefit from their own failure to follow applicable rules.

---

[3] Because the Court denied Plaintiffs' Motion without a memorandum decision and adopted the Defendants' reasoning, Plaintiffs will refer to Defendants' arguments with the understanding that they were the grounds for the Court's decision.

On appeal, Plaintiffs seek reversal of the District Court's decision denying them relief from the Order of Dismissal Without Prejudice which was entered in the matter on September 16, 1991, but which, through the failure of Defendants to comply with the applicable procedural rules, deprived Plaintiffs of actual notice of the entry of the Order until after November 24, 1992. Each of Defendants' arguments against granting the relief Plaintiffs' requested and the District Court's adoption thereof, are clearly erroneous and not properly founded.[4]

VII. ARGUMENT

A. DEFENDANTS FAILED TO PROVIDE NOTICE OF ENTRY OF ORDER AND FILE PROOF OF SERVICE AS REQUIRED BY RULE 58A OF THE UTAH RULES OF CIVIL PROCEDURE AND RULE 4-504(4) OF THE UTAH CODE OF JUDICIAL ADMINISTRATION.

It is undisputed in the record below that Defendants did not provide notice of entry of order to Plaintiffs. Proof of such notice is made by filing proof of service with the Court. The record below shows that no proof of service was filed. See supra Statement of Facts, no. 11. The initial question to be resolved by this Court is whether Defendants were required to provide notice of entry of order and file proof of service with the Court under U.R.C.P. 58A and/or Rule 4-504(4).

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[4] Additionally, the district court made no findings. The judgment should "follow logically from and be supported by the evidence." The judgment "should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." Acton v. Deliran, 737 P.2d 996 (Utah 1987).

1. **Utah R. Civ. P. 58A Required Defendants to Provide Notice of Entry of Order and File Proof of Service.**

Defendants argued below that the notice requirement of U.R.C.P. 58A did not apply because they were not "prevailing parties" within the meaning of the rule. See CR. 162. Defendants' argument and the District Court's reliance thereon are contrary to law and the facts of the case, constituting clear error and warranting reversal.

U.R.C.P. 58A(d) provides:

> **Notice of signing or entry of judgment.** The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

A stipulation and order dismissing an action without prejudice constitutes a judgment of the rendering court. Gardner v. A.H. Robbins Co., 747 F.2d 1180 (8th Cir. 1984). Because the Stipulation and Order in this case is a "judgment", U.R.C.P. 58A applies. Therefore, there must necessarily be a prevailing party, at least for purposes of the obligation to provide notice of entry of order and file proof of service under the rule. In most cases the prevailing party is determined by the facts and circumstances of the case. Otherwise, the rule would be inapplicable to any matter in which the court did not designate a prevailing party.

In this case, Defendants brought a Motion to Dismiss the case for Plaintiff's failure to provide a non-resident cost bond. CR. 104-107. After discussions between counsel, a stipulation for dismissal was agreed to. Defendants objective of obtaining a dismissal by bringing the Motion to Dismiss was, therefore, realized. Defendants then

prepared the first stipulation and transmitted it to Plaintiffs for signature. Clearly, Defendants assumed the position of a prevailing party in form and substance by bringing the motion, obtaining a dismissal and presenting the Order to the Court. By "prevailing on the main issue," Defendants were prevailing parties and required to provide notice of entry of order and file proof of service pursuant to U.R.C.P. 58A. Cf. CR. 162. It is undisputed that they failed to do so.

2. **Defendants Failed to Provide Notice of Entry of Order and Proof of Service as Required by Rule 4-504(4) of the Utah Code of Judicial Administration.**

Defendants argued below that, as with U.R.C.P. 58A, only a prevailing party is required to provide notice of entry of order and proof of service under Rule 4-504(4) of the Utah Code of Judicial Administration. This contention is unsupported by authority, is contrary to the plain language of the rule and contravenes the basic policy behind notice requirements. It would further be inequitable in view of Plaintiffs' request that Defendants provide an executed copy of the order after it was signed by the judge.

Rule 4-504(4) provides:

> (4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.

A stipulation and order dismissing an action without prejudice constitutes a judgment of the rendering court. Gardner v. A.H. Robbins Co., 747 F.2d 1180 (8th Cir. 1984). In this case there was a judgment entered. According to the rule, upon the entry of the

judgment notice shall be served on the opposing party. Defendants stated they were not the prevailing party. As demonstrated above, they were the prevailing party. Furthermore, a more logical reading of the more broadly worded Rule indicates that the party who submits the order for signature, whether prevailing or not, must serve the notice on the "opposing party". See 4-504(4). This reading is more consistent with the language of the rule and common sense, i.e. the party causing the judgment to be entered is the party responsible for giving notice of its entry to the opposing party.

Additionally, the Rule's language specifically deals with an "opposing party" rather than the "prevailing party". The Rule was intended to encompass stipulations as well as judgments on the merits. This is evidenced by the placement of subsection (4) after subsection (2) and (3). Rule 4-504(4) applies to judgments regardless of whether they are the result of a stipulation (4-504(3)) or a decision on the merits (4-504(2)). If the notice requirements of 4-504(4) applied only to Rule 4-504(2), the rule would have specified that 4-504(4) applied only to judgments under 4-504(2) instead of constituting a separate subsection following (3) which deals specifically with stipulations.

Moreover, the policy underlying the adoption of the notice requirements of 4-504(4) also supports a reading that the party undertaking the obligation of presenting the order for signature must also provide notice of its entry and file proof of service with the court. As the Court of Appeals stated in Workman v. Nagle Construction, 802 P.2d 749 (Utah App. 1990), stated, "the purpose and intended effect of the Utah and federal rules are the same, namely, notice that a judgment has been entered." Additionally, the Utah Supreme Court has indicated that the District Court Rules and Circuit Court Rules (now

the Code of Judicial Administration) are supplemental to the Rules of Civil Procedure. Bigelow v. Ingersoll, 618 P.2d 50, 52 (Utah 1980).

Therefore, whether technically a prevailing party or not, Defendants undertook the obligation to present the Stipulation and Order to the Court for signature and entry. Therefore, they were required by the Rule to provide notice of entry of order and file proof of service with the Court. Defendants failed to do so. In light of their failure to comply with the notice requirements of the Rule, Plaintiffs Motion for Relief must be granted.

B. THE COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS' REQUEST FOR RELIEF.

Plaintiffs' Motion for Relief requested that the September 16, 1991, Order be deemed filed as of the day they acquired actual notice of the entry of order, namely, November 24, 1992. Defendants, argued that Plaintiffs' Motion was actually an untimely 60(b)(1) motion founded upon attorney error, that no compelling grounds existed to justify relief. The following will show that each of Defendants' arguments is clearly erroneous and the District Court's reliance on them constitutes plain error and resulted in an abuse of discretion.

1. **Defendants Failure to Provide Notice of Entry of Order Deprived Plaintiffs of Notice and Justifies U.R.C.P. 60(b)(7) Relief.**

A request for relief from the operation of a stipulated judgment is properly addressed by a Rule 60(b) motion. See Moore's Federal Practice, ¶60.27[2], and

accompanying authority.[5] Rule 60 (b) of the Utah Rules of Civil Procedure provides in relevant part:

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . .
>
> (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. . . .

In this case Defendants' first argument for denying Plaintiffs' Motion was that Rule 60(b)(7) was inapplicable. Defendants' memorandum, adopted as the District Court's reasoning, stated that Plaintiffs' Motion was based on "attorney inadvertence or neglect and falls within Rule 60 (b)(1)". CR. 159. Defendants, thereafter, argued that failure of Plaintiffs' counsel to request relief for over fourteen months was outside of the three month limit imposed by U.R.C.P. 60(b)(1). Id. However, the neglect which caused the fourteen month delay in requesting relief in this case was the result of the omission of Defendants' counsel in failing to provide notice of entry of order rather than any alleged neglect on the part of Plaintiffs' counsel for failing to receive the notice of entry of the order.

Furthermore, even assuming Defendants were under no obligation to provide notice of entry or proof of service, the failure of an attorney to act is seen by federal

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[5] In the absence of controlling state court decisions, the courts of this State will look to federal decisions addressing similar rules of civil procedure for guidance. Winegar v. Slim Olson, Inc., 252 P.2d 205 (Utah 1953).

courts as coming within the "any other reason" provisions of Federal Rule 60(b)(6), which is identical to Rule 60(b)(7) of the Utah Rules, and must be brought within a reasonable time. See Moore's Federal Practice, ¶60-286, at n.41, 42. Plaintiffs' Motion for Relief was, therefore, properly grounded in U.R.C.P. 60(b)(7).

2. **Compelling Grounds Existed for Relief from the Judgment or Order.**

Defendants' failure to file and serve the required notices, as aforesaid, has been prejudicial to Plaintiffs. The Order of Dismissal Without Prejudice operated to trigger U.C.A. §78-12-40, giving Plaintiffs one year from the date of the "failure" of their action to refile. The purpose of this law is to permit potentially valid suits to be heard which may otherwise be barred if they are dismissed without prejudice after the applicable statute of limitations has run. Marsden v. Borthick, 769 P.2d 245 (Utah 1988).

Under the September 16, 1991, Order, the one year refiling period expired on September 16, 1992. However, Plaintiffs did not even discover that the Order of Dismissal Without Prejudice dated September 16, 1991, had been entered until after November 24, 1992. Defendants' failure to provide Plaintiffs with the required notice served to hinder refiling of a Complaint by the widow and minor son of David W. Rounds of their action until after the period provided by said statute expired. The prejudice of being deprived of their action is self-evident.

It is a rule of equity that a party not be allowed to benefit from his own improper or dilatory conduct or that of his legal counsel. See Dutton v. Rocky Mountain Phosphates, 438 P.2d 674 (Mont. 1968); 27 Am. Jur. 2d Equity, §§138 & 147. Here, if Defendants are allowed to avoid their duty to provide notice as required by the Rules

and thereby derive a benefit by preventing the opposing party from having his day in court, justice will be circumvented. Equity demands that Defendants' conduct not be rewarded. As the Court in Dutton, stated:

> Relief will be granted when, in view of all the circumstances, to deny it would permit one of the parties to suffer a gross wrong at the hands of the other party who brought about the condition.

Dutton, 438 P.2d at 684.

The District Court's failure to grant Plaintiffs the relief requested improperly permitted Defendants to derive a benefit from their improper actions thereby constituting an abuse of discretion and warranting reversal.

3. Plaintiffs' Motion for Relief was Timely Presented Pursuant to U.R.A.P. 60(b)(7).

The Utah Court of Appeals in Workman v. Nagle Construction, 802 P.2d 749 (Utah App. 1990), stated that "if a losing party has remained ignorant of a judgment in part because the prevailing party has not complied with Rule 58A(d), the resulting delay is more reasonable for purposes of Rule 60(b)(5) through (7)." Id. at 250. The Workman Court further held that the defendant's 60(b) motion was timely because the motion for relief was brought approximately one month after discovery of the entry of the order. Id. Finally, the Court stated, "while noncompliance with those rules does not bring about automatic invalidity of an entered judgment, it is a weighty factor in determining the timeliness of later challenges to the judgment under Utah R. Civ. P. 60(b)(5)-(7)." Workman, 802 P.2d at 750.

In this case, as in Workman, Plaintiffs were not served with any notice of entry of order. See supra Statement of Facts no. 11. Moreover, Plaintiffs' Motion was brought within two months after actual discovery of entry of the Order, on January 15, 1993. Therefore, Plaintiffs' Motion for Relief from Judgment or Order was properly and timely before the Court for consideration pursuant to U.R.C.P. 60(b)(7). The Court's holding to the contrary constitutes clear error and warrants reversal.

C. THE COURT ERRED BY FAILING TO GRANT PLAINTIFFS RELIEF BECAUSE THE EFFECTIVE DATE OF THE ORDER WAS TOLLED UNTIL PLAINTIFFS RECEIVED ACTUAL NOTICE OF ENTRY OF THE ORDER.

The Utah Court of Appeals has stated that the rules requiring the prevailing party to provide notice of entry pursuant to Rule 58A(d) or Rule 4-504 are not "inert desiderata" although the judgment is nonetheless "effective". Workman, 802 P.2d at 752. The Utah Supreme Court has addressed the issue of failure to provide notice of entry of order only once, finding harmless error had occurred. Mountain States Tel. & Tel. v. Sohm, 755 P.2d 155, 157 (Utah 1988). The Utah Supreme Court has, however, stated of the earlier procedural rules:

> Practical considerations and fairness in appellate procedure support this conclusion. Prior to promulgation of Rule 2.9(b), counsel were obliged to constantly check with the court clerk to determine whether a judgment had been filed. On occasion, because of the press of other business and the lack of notice, filing dates were missed and what may have been meritorious appeals, dismissed. The District Court and Circuit Court Rules were designed in part to obviate this problem. Proper effectuation of both rules requires that Rule 2.9(b) of the District and Circuit Court Rules be read together with Rule 58A of the Utah Rules of Civil Procedure.

Bigelow v. Ingersoll, 618 P.2d 50, 52-53 (Utah 1980).

Under Rule 58A, the only time period which is not specifically tolled pending receipt of notice of entry of an order is the period for filing a notice of appeal. U.R.C.P. 58A(d). This express reservation indicates, by negative implication, that a failure to provide notice of entry of judgment or order will toll the accrual of effective date of the Judgment for other purposes. Otherwise, Rule 58A(d) would simply have provided that no periods are tolled pending filing and service of notice of entry of order. Interestingly, if no periods were tolled pending filing and service of notice of entry, Rule 58A(d) and Rule 4-504(4) would, in fact, be inert desiderata and have no meaning whatsoever. Cf. Workman, at 750. Finally, the Code of Judicial Administration, Rule 4-504(4), does not even carve out the notice of appeal exception provided by Rule 58A(d), further indicating that tolling of the effective date of the Order is proper until notice thereof is provided to the opposing party.

Justice requires that the Order of Dismissal Without Prejudice be deemed entered as of the date Plaintiffs discovered that it had been entered. Giving this effect to the Order would preclude Defendants from benefiting from their failure to comply with the Rules and, at the same time, would preserve the effectiveness of the Order. Cf. Workman, 803 P.2d at 750. In the alternative, the Order should be vacated and set aside altogether.

The fact that notice of entry of order was neither filed nor served herein, as required by the Rules, is undisputed. That prejudice has resulted from Defendants' omission is also uncontestable. As the Bigelow Court noted, prior to promulgation of the Rules:

> . . . counsel were obliged to constantly check with the court clerk to determine whether a judgment had been filed. On occasion, because of the press of other business and the lack of notice, filing dates were missed and what may have been meritorious appeals, dismissed. The District Court and Circuit Court Rules were designed in part to obviate this problem. . . .

The District Court erred in its application of the Rules to the facts of this case, warranting reversal of the Court's Order denying Plaintiffs relief.

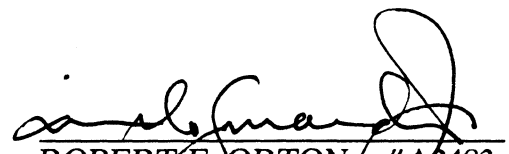
VIII. CONCLUSION

Plaintiffs seek relief from the Order of Dismissal Without Prejudice which was entered on September 16, 1991, but which they did not discover was entered until after November 24, 1992. They have demonstrated that Defendants failed to provide notice of entry of Order as required by the Rules and as requested by Plaintiffs' counsel, nor did they file proof of service with the court. Plaintiffs have shown that their Motion for Relief From Judgment or Order was timely and that compelling grounds existed justifying the relief requested. Plaintiffs have further shown that the effectiveness of the judgment can be preserved while affording the requested relief. Finally, justice requires Defendants not be permitted to benefit from their failure to comply with the applicable Rules.

The District Court clearly abused its discretion by denying Plaintiffs' request for relief in light of Defendants' failure to observe the applicable rules and the other facts favoring the relief requested. Plaintiffs should be given relief from the Order of Dismissal Without Prejudice in the form of an order declaring that said Order be set

aside or, alternatively, that it be deemed entered as of the date Plaintiffs actually became aware of its entry.

Respectfully submitted this 26TH day of July, 1993.



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TELEPHONE: (801) 521-3800

I, MSM certify that on 7-26-93 I served copies of the attached BRIEF OF APPELLANTS upon the following counsel for the Defendants/Appellees in this matter by mailing it to them by first class mail with sufficient postage prepaid to the following addresses:

REED M. STRINGHAM, Esq.
Assistant Attorney General
Attorney for Defendant, State of Utah
Department of Transportation
236 State Capitol
Salt Lake City, UT 84114

/s/
MILO S. MARSDEN
ROBERT F. ORTON

ADDENDUM

LAW OFFICES
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OF COUNSEL
RENDELL N. MABEY

September 4, 1991

Reed M. Stringham III
Assistant Attorney General
Litigation Division
236 State Capitol
Salt Lake City, Utah 84114

Re: Rounds vs. State of Utah and Utah Department of Transportation

Dear Reed:

I am enclosing a revised Stipulation and Order of Dismissal Without Prejudice. If you are in agreement with the changes, please present the Order to the Court for signing and entry and provide me with an executed copy thereof.

Thank you for your cooperation.

Very truly yours,

ROBERT F. ORTON

RFO:kdm

Enclosure

JAN GRAHAM - 1231
Attorney General
REED M. STRINGHAM - 4679
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236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1016

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

JANICE ROUNDS and DYLAN ROUNDS, Plaintiffs, v. STATE OF UTAH, and UTAH DEPARTMENT OF TRANSPORTATION, Defendants.	**DEFENDANTS' MEMORANDUM OPPOSING PLAINTIFFS' MOTION FOR RELIEF FROM JUDGMENT OR ORDER** Civil No. 900902566PI Judge J. Dennis Frederick

This is the memorandum of defendants State of Utah and Utah Department of Transportation (collectively "UDOT") opposing plaintiffs' motion for relief from judgment or order.

FACTS

In addition to the facts submitted by plaintiffs, UDOT submits the following:

1. On June 20 and 21, 1991 respectively, counsel for UDOT filed two motions: a motion to compel plaintiffs to provide sufficient answers to interrogatories that had been served on

August 20, 1990; and a motion to dismiss without prejudice because plaintiffs failed to file the undertaking required by Utah Code Ann. § 63-30-19. Affidavit of Reed Stringham.

2. Plaintiffs did not respond to the motions, so on July 15, 1991 the motions were submitted for decision. Id.

3. On or about July 18, 1991, UDOT's counsel agreed to allow plaintiffs until August 15, 1991 to respond to the motions. Id.

4. Sometime after August 15, 1991 but before September 3, 1991, plaintiffs' counsel called UDOT's counsel and said that plaintiffs would stipulate to dismissal without prejudice if UDOT would withdraw its motion to compel. UDOT's counsel agreed, prepared a stipulation and order and had it delivered to plaintiffs' counsel on September 3, 1991 for approval. A copy of the proposed stipulation is contained at Exhibit A to the Affidavit of Robert F. Orton in Support of Plaintiffs' Motion for Relief From Judgment or Order. Id.

5. On September 6, 1991, UDOT's counsel received in the mail from plaintiffs' counsel a court paper titled "Stipulation and Order of Dismissal Without Prejudice." UDOT's counsel reviewed it and signed it on that day. Id.

6. The substance of the stipulation and order prepared by plaintiffs' counsel is identical to one proposed earlier by UDOT's counsel. UDOT's proposed stipulation and order states:

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STIPULATION

The parties, through their respective counsel, stipulate that this action be dismissed without prejudice, each party to bear their own costs, and that defendant's motion to compel be withdrawn.

ORDER

Based on the stipulation of the parties, and good cause appearing therefor, this action is dismissed without prejudice, each party to bear their own costs, and defendant's motion to compel is withdrawn.

The stipulation and order prepared by plaintiffs' counsel states:

STIPULATION

The parties, through their respective counsel, stipulate and agree:

1. That Defendants' Motion to Dismiss may be granted provided that the dismissal shall not be on the merits and shall be without prejudice.

2. That Defendants' Motion to Compel may be withdrawn.

3. That the parties shall bear their own costs of suit.

ORDER

Based on the Stipulation of the parties, and good cause appearing therefor,

IT IS HEREBY ORDERED:

1. That Defendants' Motion to Compel be and the same is hereby ordered withdrawn.

2. That Defendants' Motion to Dismiss be and th ame is hereby granted and Plaintiffs' Complaint be and is hereb dismissed; provided, however, that said dismissal is not a dismissal on the merits and is without prejudice.

3. That the parties bear their own costs of suit.

See Exhibits to Orton's Affidavit.

7. After signing the stipulation, UDOT's counsel

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handed it to his secretary and told her to send the original to the court and to mail a copy of it to plaintiff's counsel. Stringham Affidavit.

8. It is not known whether a copy was mailed to plaintiff's counsel. UDOT's counsel did not follow up with his secretary to make sure she sent a copy to plaintiff's counsel. However, it has been UDOT's counsel's experience that his secretary follows his instructions and mails papers that he asks her to mail. Id.

9. Plaintiffs did not conduct any discovery from the filing of the lawsuit until the dismissal of the action on September 16, 1991. Plaintiffs did not thereafter attempt to prosecute the case. Id.

PLAINTIFFS' BURDEN OF PROOF

Plaintiffs have moved for relief from judgment pursuant to Rule 60(b)(7), Utah R. Civ. P. The rule gives the court discretionary authority to relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment." Id. In order to prevail on a Rule 60(b)(7) motion, a party must demonstrate the following:

1. the reason for relief must be one other than those listed in Rule 60(b)(1) - (6);

2. the reason justifies relief from judgment;

3. the motion is made in a reasonable time.

Laub v. South Central Utah Tel. Ass'n., 657 P.2d 1304 (Utah 1982).

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ARGUMENT

PLAINTIFFS' MOTION DOES NOT SATISFY RULE 60(b)(7)

Plaintiffs cannot establish the elements of a motion under Rule 60(b)(7). Their proferred reason for relief, that they did not receive notice of the judgment, is based if anything on attorney inadvertence or neglect and falls within Rule 60(b)(1). Moreover, the reason does not justify relief from judgment because plaintiffs' counsel, having drafted the stipulation and order of dismissal, fully intended it to be signed and entered. There can be no claim of prejudice when plaintiffs did nothing for over fourteen months to attempt to prosecute the case or inquire as to the status of the order their attorney drafted. Finally, plaintiffs' sixteen month delay in bringing the motion for relief is not reasonable.

A. Proffered Justification Falls Within Rule 60(b)(1)

Rule 60(b)(1) permits relief from judgment where there is "mistake, inadvertence, surprise or excusable neglect." Where attorney neglect is the proffered reason for relief, Utah's appeals courts apply Rule 60(b)(1). See Annotations to Rule 60(b)(1) in Utah Court Rules Ann. pp. 197, 201-202 (1992). Federal courts also have "frequently" held that cases of attorney neglect fall within the identical Fed. R. Civ. P. 60(b)(1) rather than the federal version of Utah R. Civ. P. 60(b)(7). C. Wright & A. Miller, Federal Practice & Procedure § 2864 p. 222 (1973).

In the present case, plaintiffs received tardy notice of the dismissal as a result of attorney neglect. Plaintiffs'

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counsel drafted the stipulation and order for dismissal and approved the order as to form. He sent it to defense counsel in September 1991 with the intent that it would be signed and entered. When he did not hear from defense counsel, plaintiffs' attorney made no inquiry. He did nothing in the case for the next fourteen months until November, 1992 when, upon inquiry by plaintiffs, he investigated and discovered that the order of dismissal had been entered on September 16, 1991. This is neglect, if anything, and falls within Rule 60(b)(1). It is not "any other reason justifying relief." Plaintiffs cannot establish the first element of their motion.

B. Reason Does Not Justify Relief

Plaintiffs argue that they are entitled to relief because they did not receive notice of the dismissal. According to them, UDOT was required by local Rule 4-504(2) to provide a copy of the proposed judgment to plaintiffs prior to its presentment to the court. Also according to plaintiffs, UDOT was required to provide notice of entry of judgment pursuant to Rule 4-504(4), C.J.A., and Rule 58A, Utah R. Civ. P. Since plaintiffs' counsel never received either notice, they conclude that the judgment was never filed and is therefore invalid.

Plaintiffs' argument errs because Rule 4-504(2) does not apply. It governs the procedure for submitting orders based on judicial determinations of disputed issues. A different rule applies where there is a stipulated dismissal. Rule 4-504(3) states:

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> (3) Stipulated settlements and dismissals shall also be reduced in writing and presented to the court for signature within fifteen days of the settlement and dismissal.

The rule does not say anything about serving a stipulation before presentment to the court. Thus, UDOT was not required by local rule to send a copy of the stipulation back to plaintiffs' counsel.

The reason for a different local rule for stipulated dismissals is clear. Parties to a stipulation are both fully aware of what is occurring in their case, each having reached an agreement and having executed the stipulation. There is no need for further notice to a party who has drafted and signed a stipulation and approved an order as to form, especially when there is no question that the stipulation will be signed because its substance is identical to one previously drafted by the opposing party. In this case, therefore, plaintiffs received sufficient notice of the stipulation and order before it was presented to the court.

The decision in Bigelow v. Ingersoll, 618 P.2d 580 (Utah 1980) is not to the contrary. In Bigelow the court held that an opposing party must be served with a copy of a proposed order before it is presented to the judge. The purpose of this rule is to notify the opposing party that a judgment has been filed. However, Bigelow involved a judicial determination of disputed issues rather than a stipulated dismissal. The controlling local rule in Bigelow simply does not apply here

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because in this case there is no rule requiring service of a stipulated order of dismissal prior to presentment to the court. Plaintiffs here had adequate notice, as demonstrated above, so Bigelow is distinguishable.

Plaintiffs also incorrectly contend that the judgment is invalid because they did not receive notice of entry of judgment. Rule 58A(d) requires "prevailing parties" to give notice. A prevailing party is one who "successfully prosecutes the action or successfully defends against it, prevailing on the main issue." Black's Law Dictionary (4th ed. 1951). Since the stipulation in the present case was for dismissal without prejudice, defendants are not prevailing parties and had no obligation under the rules to give notice. In any event, Utah Court of Appeals rejected plaintiffs' argument in Workman v. Nagle Construction Co., 802 P.2d 749 (Utah App. 1990). In Nagle, the plaintiff did not give notice of entry of judgment and the defendants argued that this omission invalidated the judgment. The court rejected the argument holding that "[n]otice to the parties of the entry of judgment was therefore not a prerequisite to its effectiveness." Id. at 751.

Additionally, Rule 4-504(4) does not help plaintiffs' cause. The rule requires that notice of entry of judgment be served on "the opposing party." However, it does not say who is to serve notice. Given that omission, it is logical to assume that the "prevailing party" has the obligation as required by Rule 58A. UDOT is not a prevailing party, as shown above, and

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therefore has no obligation to give notice.

Finally, plaintiffs wrongly suggest that they are unfairly prejudiced. It was plaintiffs who initially proposed a dismissal and had their attorney draft a stipulation and order to that effect. Their attorney signed the stipulation, approved it as to form and sent it to defense counsel for his signature. Since the proposed stipulation was substantively identical to one that UDOT proposed earlier, it is no surprise that UDOT agreed to it. UDOT's counsel then instructed his secretary to send an executed copy to plaintiff's counsel, but he never received it. Nevertheless, instead of asking abut the stipulation or attempting to prosecute the case, plaintiffs did nothing for the next fourteen months. It is unreasonable for plaintiffs to claim unfair prejudice on these facts. They certainly did not wait fourteen months expecting UDOT's counsel to respond to the proposed stipulation. Rather, they simply failed to follow through on a matter they set in motion. The Rule 60(b) policy announced by the Tenth Circuit Court of Appeals in Binder Robinson & Co. v. U.S.S.C.C., 748 F.2d 1415, 1421 (10th Cir. 1984) is equally applicable here:

> Keeping the suit alive merely because the plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of the plaintiff's lawyer upon the defendant. (emphasis original)

(quoting Link v. Wabash Railroad, 370 U.S. 626, 634 n. 10 (1962).)

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C. Unreasonable Period of Time

Plaintiffs cannot establish that their motion for relief is made within a reasonable time. They set in motion the events leading to the dismissal. They had an entire year to inquire about the stipulation and did nothing. If they had attempted to prosecute the action during that year they would have learned of the dismissal. The fact that they did not get an executed copy of the stipulation and order is unfortunate, but that is not an important factor because the requirements of the local rules and Rule 58A, Utah R. Civ. P., do not apply to stipulated dismissals. Therefore, plaintiffs' motion for relief from judgment is not filed in a reasonable time.

CONCLUSION

Plaintiffs cannot satisfy the requirements of Rule 60(b)(7). Their motion for relief from judgment should be denied.

DATED this 27 day of January, 1993.

JAN GRAHAM
Attorney General

Reed Stringham

REED M. STRINGHAM III
Assistant Attorney General
Litigation Division

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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing **DEFENDANTS' MEMORANDUM OPPOSING PLAINTIFFS' MOTION FOR RELIEF FROM JUDGMENT OR ORDER**, this 27 day of January, 1993, to the following:

Robert F. Orton
Milo S. Marsden
MARSDEN, ORTON, CAHOON & GOTTFREDSON
68 SOUTH MAIN STREET
FIFTH FLOOR
SALT LAKE CITY, UTAH 84101

Betty Schofield

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JAN GRAHAM - 1231
Attorney General
REED M. STRINGHAM - 4679
Assistant Attorney General
Attorney for State of Utah
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1016

JAN 20 5 13 PM '93
BY Lee Ann B. Hawks CLERK

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

JANICE ROUNDS, and DYLAN ROUNDS, Plaintiffs, v. STATE OF UTAH, and UTAH DEPARTMENT OF TRANSPORTATION, Defendants.	**AFFIDAVIT OF REED M. STRINGHAM** Civil No. 900902566 PI Judge J. Dennis Frederick

STATE OF UTAH)
:ss
County of Salt Lake)

Reed Stringham being sworn states:

1. I am the attorney for the defendants in this action. I have personal knowledge of the facts in this affidavit and am competent to testify to them.

2. On June 20 and 21, 1991 respectively, I filed on behalf of defendants two motions: a motion to compel plaintiffs to provide sufficient answers to interrogatories that had been served on August 20, 1990; and a motion to dismiss without

prejudice because plaintiffs failed to file the undertaking required by Utah Code Ann. § 63-30-19.

3. Plaintiffs did not respond to the motions, so on July 15, 1991 the motions were submitted for decision.

4. On or about July 18, 1991 I agreed to allow plaintiffs until August 15, 1991 to respond to the motions.

5. Sometime after August 15, 1991 but before September 3, 1991, plaintiffs' counsel called me and said that plaintiffs would stipulate to dismissal without prejudice if defendants would withdraw their motion to compel. I agreed, prepared a stipulation and order and had it delivered to plaintiffs' counsel on September 3, 1991 for his approval. A copy of the proposed stipulation is contained at Exhibit A to the Affidavit of Robert F. Orton in Support of Plaintiffs' Motion for Relief From Judgment or Order.

6. On September 6, 1991, I received in the mail from plaintiffs' counsel a court paper titled "Stipulation and Order of Dismissal Without Prejudice." I reviewed it and signed it on that day.

7. After signing the stipulation I handed it to my secretary and told her to send the original to the court and to mail a copy of it to plaintiffs' counsel.

8. I do not know whether a copy was mailed to plaintiffs' counsel. I did not follow up with my secretary to make sure she sent a copy to plaintiffs' counsel. However, it has been my experience that my secretary follows my instructions and mails papers that I ask her to mail.

9. Plaintiffs did not conduct any discovery from the filing of the lawsuit until the dismissal of the action on September 16, 1991. Plaintiffs did not attempt to move the case forward after that date.

DATED this 26 day of January, 1993.

REED M. STRINGHAM III
Assistant Attorney General
Litigation Division

SUBSCRIBED AND SWORN to before me this 26 day of January, 1993.

Notary Public
BETTY SCHOFIELD
236 State Capitol
Salt Lake City, Utah 84114
My Commission Expires
August 9, 1993
State of Utah

NOTARY PUBLIC

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing AFFIDAVIT OF REED STRINGHAM, this 27 day of January, 1993, to the following:

Robert F. Orton
Milo S. Marsden
MARSDEN, ORTON, CAHOON & GOTTFREDSON
68 South Main Street
Fifth Floor
Salt Lake City, Utah 84101

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
ROUNDS, JANICE	:	
PLAINTIFF	:	CASE NUMBER 900902566 PI
	:	DATE 02/22/93
VS	:	HONORABLE J. DENNIS FREDERICK
	:	COURT REPORTER
STATE OF UTAH	:	COURT CLERK CLB
UTAH DEPT OF TRANSPO DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

AFTER REVIEW OF THE PLEADINGS AND UPON RECEIPT OF THE NOTICE TO SUBMIT FOR DECISION DATED FEBRUARY 19, 1993, THE COURT RULES AS FOLLOWS:

1. PLAINTIFFS' MOTION FOR RELIEF FROM JUDGMENT, ETC. IS DENIED, FOR THE REASONS STATED IN DEFENDANT'S MEMORANDUM IN OPPOSITION.

2. COUNSEL FOR DEFENDANT TO PREPARE THE APPROPRIATE ORDER.

MAR 9 1993
SALT LAKE COUNTY
By

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Attorney General
REED M. STRINGHAM - 4679
Assistant Attorney General
Attorney for State of Utah
330 South 300 East
Salt Lake City, Utah 84111
Telephone: (801) 575-1650

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

JANICE ROUNDS and DYLAN ROUNDS, Plaintiffs, v. STATE OF UTAH, and UTAH DEPARTMENT OF TRANSPORTATION, Defendants.	**ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT** Civil No. 900902566PI Judge J. Dennis Frederick

Plaintiffs filed a Motion for Relief from Judgment or Order. The parties filed supporting and opposing memoranda and affidavits and the motion was submitted for decision on February 19, 1993. The Court denied the motion for the reasons stated in its February 22, 1993 Minute Entry.

IT IS ORDERED that plaintiffs' Motion for Relief from Judgment is denied.

DATED this 9th day of ~~February~~ March, 1993.

BY THE COURT:

HONORABLE J. DENNIS FREDERICK
District Court Judge

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing **ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT**, this 25th day of February, 1993, to the following:

Robert F. Orton
Milo S. Marsden
MARSDEN, ORTON, CAHOON & GOTTFREDSON
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SALT LAKE CITY, UTAH 84101

Pat Jenson